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CRAWFORD V. WASHINGTON: IMPLICATIONS FOR THE WAR ON TERRORISM

Margaret M. O'Neil*

*"I know of no principle in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principle so truly important."*¹

Chief Justice John Marshall's subject was the Sixth Amendment's Confrontation Clause.² The fundamental fairness of the idea that one has the right to hear accusations forthrightly from those who make them resonates from the schoolyard to the courtroom. In legal proceedings, it is considered a "bedrock procedural guarantee,"³ distinguishing modern tribunals from the Star Chamber inquisitions relegated to an unenlightened period in history.⁴

The Supreme Court's Confrontation Clause jurisprudence during the last fifty years has neglected the Chief Justice's admonition as the Court veered between competing perspectives.⁵ Arguably, the dominant perspective has placed primacy on the Clause's "truth seeking goals," identifying actual face-to-face confrontation to be a "preference" rather

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1. *Crawford v. Washington*, 124 S. Ct. 1354, 1377 (2004) (emphasis added) (Rehnquist, C.J., concurring in the judgment) (quoting *United States v. Burr*, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694)).

2. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .").

3. *Crawford*, 124 S. Ct. at 1359.

4. See Margaret A. Berger, *The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model*, 76 MINN. L. REV. 557, 568-74 (1992). The author explains the English antecedents to the American Confrontation Clause. *Id.* She notes in particular that "[i]n Star Chamber proceedings, the accused could be committed to prison indefinitely [without] trial . . . required to swear . . . [to] answer all questions truthfully . . . even though he was ordinarily not informed of the charges against him, nor allowed counsel . . . [and] was confronted with interrogatories based on information furnished through . . . secret examinations." *Id.* at 570 n.51 (internal citation omitted).

5. See Cornelius M. Murphy, Note, *Justice Scalia and the Confrontation Clause: A Case Study in Originalist Adjudication of Individual Rights*, 34 AM. CRIM. L. REV. 1243, 1243 (1997). The author focuses on Justice Scalia's originalist approach to the Confrontation Clause and compares it with the interpretation other members of the Court apply. *Id.* at 1244.

than a command, so long as other indices of reliability are available.⁶ The other perspective looks to the historical foundations of the Clause as a safeguard against the power of the state to coerce testimonial evidence and to preserve a defendant's categorical right to confrontation.⁷ The conflict between these two strains has left the lower courts struggling to find a framework for adjudicating Confrontation Clause challenges amidst Supreme Court rulings that have become "less coherent, more fractured, and less predictable."⁸

The Court's decision in *Crawford v. Washington*⁹ marks the ascendancy of the originalist¹⁰ approach, providing a bright-line rule for a large class of Confrontation Clause cases—those involving the use of out-of-court testimonial statements.¹¹ In *Crawford*, the Court overruled precedent by holding that use of prior testimony of an absent witness against a defendant where there had been no opportunity for cross-examination violated the Sixth Amendment's Confrontation Clause.¹² Writing for the Court, Justice Scalia noted that "the principal evil at

6. *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (citing *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)).

7. *Murphy*, *supra* note 5, at 1247-49.

8. Ruth L. Friedman, Comment, *The Confrontation Clause in Search of a Paradigm: Has Public Policy Trumped the Constitution?*, 22 PACE L. REV. 455, 457 (2002); see also Roger W. Kirst, *Appellate Court Answers to the Confrontation Questions in Lilly v. Virginia*, 53 SYRACUSE L. REV. 87 (2003). Professor Kirst provides a comprehensive analysis of appellate court treatment of Confrontation Clause challenges after the Supreme Court's ruling in the Confrontation Clause case proceeding in *Crawford*. *Id.* In *Lilly v. Virginia*, 527 U.S. 116 (1999), the Court heard a challenge to a Virginia Supreme Court decision permitting use of a custodial confession by the defendant's brother inculcating the defendant, *id.* at 121-22. The brother later refused to testify, claiming his Fifth Amendment protection against self-incrimination. *Id.* at 121. The state court relied on the statement against penal interest exception to the hearsay rules to allow the testimony. *Id.* at 121-123. The Supreme Court unanimously reversed, agreeing that the use of the statement violated the Confrontation Clause. *Id.* at 139-40. However, the decision was only a plurality opinion because the justices failed to reach consensus on a rationale. *Id.* at 120. All of the justices did agree that custodial confessions should be treated differently than private confessions. Compare *Lilly*, 527 U.S. at 131-40 (opinion of Stevens, J.) (explaining that a suspect's statements while in custody lack veracity because he knows that anything he says can be used against him), with *id.* at 143 (Scalia, J., concurring) (referring to a custodial interrogation as a "paradigmatic Confrontation Clause violation").

9. 124 S. Ct. 1354 (2004).

10. *Id.* at 1362-68; see Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1085 (1989). Professor Farber defines originalists as those justices and judges who "are committed to the view that original intent is not only relevant but authoritative, that we are in some sense obligated to follow the intent of the framers." *Id.* at 1086; see also *Murphy*, *supra* note 5, at 1265-66.

11. *Crawford*, 124 S. Ct. at 1373-74.

12. *Id.*

which the Confrontation Clause was directed was . . . [the] use of ex parte examinations as evidence against the accused.”¹³

The seven justice majority in *Crawford* suggests future stability in the Court’s treatment of the Confrontation Clause.¹⁴ Yet this consensus may prove illusory.¹⁵ *Crawford* left several potentially divisive questions unanswered that are likely to come to a head due to American counterterrorism policies.¹⁶ Not surprisingly, the courts will face these issues when adjudicating the fate of enemy combatants held under U.S. control and when prosecuting terrorist suspects captured within our borders.¹⁷ Indeed, one month after *Crawford*, the U.S. Court of Appeals for the Fourth Circuit ruled in *United States v. Moussaoui*¹⁸ that a defendant’s right to present witnesses in his own defense was satisfied by the presentation of government provided summaries of ex parte statements made to federal officers.¹⁹

This Comment will explore the potential impact of *Crawford* on terrorism cases. Part I, Section A presents a review of the “unsatisfactory state”²⁰ of the law leading up to *Crawford* regarding the admissibility of hearsay evidence under the Confrontation Clause. Section B discusses the Court’s ruling in *Crawford*, focusing on the welcome clarity it provided. Section C then looks at the weighty questions *Crawford* left unanswered. Part II examines the Confrontation Clause within the legal landscape of the Court’s emerging post-September 11 jurisprudence. Specifically, this section uses the Supreme Court’s decision in *Hamdi v. Rumsfeld*²¹ and the episodic proceedings in the Fourth Circuit surrounding *Moussaoui* to assess how issues raised in these cases fit within the Court’s current interpretation of the Confrontation Clause. Part III then examines the tension between the demands of the Confrontation Clause as articulated in *Crawford* and the

13. *Id.* at 1363.

14. See Edwin Chemerinsky, *Court Bars Out-of-Court ‘Testimonial’ Statements*, TRIAL, July 2004, at 82, 85 (2004).

15. See *id.* at 84-85.

16. See Richard D. Friedman, *Adjusting to Crawford: High Court Decision Restores Confrontation Clause Protection*, 19 CRIM. JUST., Summer 2004, at 4, 5.

17. See generally Joshua L. Dratel, *The Impact of Crawford v. Washington on Terrorism Prosecutions*, CHAMPION, Sept./Oct., 2004, WL 28-OCT Champion 19 (discussing the impact of *Crawford* on military tribunal proceedings). See also Joseph Kubler, *U.S. Citizens as Enemy Combatants; Indication of a Roll-Back of Civil Liberties or a Sign of our Jurisprudential Evolution?*, 18 ST. JOHN’S J. LEGAL COMMENT. 631 (analyzing the legal authority to invoke enemy combatant status as applied to American citizens).

18. 382 F.3d 453 (4th Cir. 2004).

19. *Id.* at 479-81.

20. Friedman, *supra* note 16, at 6.

21. 124 S. Ct. 2633 (2004).

need to protect national security interests. Part IV will argue that, read within the Court's handling of fair trial rights, *Crawford* does not permit the type of crime charged to serve as an excuse for abridging Sixth Amendment protections. This Comment concludes that the Constitution provides the means to reconcile the defendant's interests with national security concerns.

I. GRAPPLING WITH THE CONTOURS OF THE CONFRONTATION CLAUSE

A. *From Mattox to Roberts: The Road to Ambiguity*

The right to confront one's accusers has "a lineage that traces back to the beginnings of Western legal culture."²² Historians record that it was added to the Bill of Rights as a bulwark against the abuses of the Crown in English history and in the American colonies.²³

The Supreme Court repeatedly has recognized that the Confrontation Clause was designed to avoid procedural unfairness, such as "'trial[s] by affidavit' . . . convictions secured through 'flagrant abuses[] . . . anonymous accusers, and absentee witnesses.'"²⁴ The rationale is that witnesses who may have incentives to provide damning testimony to police or other state authorities behind closed doors may find it more difficult to make false claims when face-to-face with the defendant.²⁵

Like most procedural guarantees, the Confrontation Clause also enhances truth finding.²⁶ The Clause endorses cross-examination to

22. *Coy v. Iowa*, 487 U.S. 1012, 1015 (1988). Justice Scalia noted that "there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Id.* at 1017 (quoting *Pointer v. Texas*, 380 U.S. 400, 404 (1965)). Drawing on *Coy*, Justice Breyer noted in *Lilly v. Virginia* that the right of the accused to directly confront his accusers finds support in *The Bible*, Shakespeare's *Richard II* and *Henry VIII*, laws adopted under King Edward VI in 1552 and Queen Elizabeth in 1558, as well as a treatise dating from 1662. *Lilly v. Virginia*, 527 U.S. 116, 140-41 (1999) (Breyer, J., concurring).

23. *Crawford v. Washington*, 124 S. Ct. 1354, 1359-63 (2004); *see also* Berger, *supra* note 4, at 579. The author recounts that the 1765 Stamp Act allowed the vice-admiralty courts "to sit without juries and to examine witnesses in chambers." *Id.* In 1768 the advocate general relied on such ex parte evidence to sue John Hancock in Admiralty Court for allegedly smuggling wine. *Id.* n.94. Defense counsel John Adams and the colonial newspapers railed against the use of secretly obtained testimony. *Id.* Contemporaneously, the English Parliament required all colonists accused of treason to be tried in England, thereby assuring witness unavailability and testimony by deposition. *Id.*

24. Murphy, *supra* note 5, at 1248.

25. Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 688-89 (1996).

26. *Id.* The author explains that the Confrontation Clause is "intermesh[ed]" with other Sixth Amendment rights that are "designed to promote the truth," specifically public trial and compulsory process rights. *Id.* *But cf.* Berger, *supra* note 4, at 572-73. The author points out that the right of confrontation was asserted originally in the seventeenth

subject the witness's claims to the crucible of adversarial testing.²⁷ Exposing the demeanor of the witness further enhances the jury's ability to weigh the reliability of the evidence the witness provides.²⁸

The confrontation right is not absolute.²⁹ The first Supreme Court case addressing the Confrontation Clause was *Mattox v. United States*³⁰ in 1895. In *Mattox*, the Court allowed in a second trial the introduction of stenographic notes from the prior testimony of subsequently deceased witnesses.³¹ The Court rested its decision on a hearsay exception allowing the admission of testimony from an unavailable witness taken at a prior proceeding at which the defendant had an opportunity for cross-examination.³² The Court drew an analogy to the exception allowing the admission of dying declarations.³³

The common law recognized both exceptions cited in *Mattox* when the Sixth Amendment was drafted,³⁴ based on the doctrine of necessity (the unavailability of the witness) as a threshold requirement.³⁵ The pursuit of truth, the Court said, required that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case."³⁶

century state trials to counter the effects of secrecy and the English Crown's power, rather than the inability to cross-examine witnesses. *Id.* Much later, evolving theories of evidence introduced cross-examination as a powerful means of testing veracity. *Id.* Berger ties this latter development to the appearance of lawyers in the eighteenth century to represent defendants. *Id.* Confrontation rights and the Rules of Evidence firmly entwined after lawyers were statutorily allowed in felony cases in 1836, although the practice started a century earlier. *Id.* at 577.

27. Carol A. Chase, *The Five Faces of the Confrontation Clause*, 40 HOUS. L. REV. 1003, 1017 (2003) (noting that in *Craig*, the Court found "four elements of confrontation which serve the purposes of the Confrontation Clause . . . : (1) the physical presence of the witness; (2) . . . testimony . . . under oath; (3) cross-examination of the witness by defense counsel; and (4) observation of witness demeanor by the jury"). *Id.*

28. *Id.* at 1011.

29. See *Maryland v. Craig*, 497 U.S. 836, 844 (1990) (asserting that "the Confrontation Clause [does not] guarantee[] criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial").

30. 156 U.S. 237 (1895).

31. Chase, *supra* note 27, at 1038.

32. *Mattox*, 156 U.S. at 243.

33. *Id.*

34. Chase, *supra* note 27, at 1039.

35. *Mattox*, 156 U.S. at 237, 244; see *Crawford v. Washington*, 124 S. Ct. 1354, 1365-66 (2004).

36. *Mattox*, 156 U.S. at 243.

1. *A Command Once So Clear*

Although grounded in established Sixth Amendment exceptions, the Court's public policy rationale foreshadowed a split in the Court over the scope of the confrontation requirement.³⁷ The *Mattox* Court also emphasized a case specific analysis that, taken to the extreme, undermined durable rules.³⁸

The Court's inconsistency is most notable in cases involving the admission of hearsay.³⁹ Following *Mattox*, the Court categorically disallowed "written evidence adverse to the defendant" unless it was accompanied by a witness who could be confronted in court.⁴⁰ Yet adopting this literal interpretation of the Confrontation Clause required barring all hearsay, undermining the truth finding function of the Clause.⁴¹ The Court then sought to "'steer a middle course,'"⁴² finding admissible prior testimony of a witness unavailable to testify at trial when the accused had a prior opportunity for cross-examination.⁴³

37. See *infra* text accompanying notes 59-69.

38. See *infra* text accompanying notes 42-71.

39. Chase, *supra* note 27, at 1043. Chase indicates that by 1970, the Court had heard a large number of Confrontation Clause challenges to the admission of hearsay, but failed to "articulat[e] a unifying principle or principles to determine generally the effect of the Confrontation Clause on the admissibility of hearsay evidence against all criminal defendants." *Id.*

40. Friedman, *supra* note 8, at 472.

41. *Mattox*, 156 U.S. at 243. The Court, for example, has held that the hearsay exception for co-conspirator statements does not violate the Confrontation Clause, nor, as discussed in *Mattox*, do dying declarations. See, e.g., *United States v. Inadi*, 475 U.S. 387, 396 (1986) ("The admission of co-conspirators' declarations into evidence . . . actually furthers the 'Confrontation Clause's very mission' which is to [promote] 'the accuracy of the truth-determining process in criminal trials.'" (internal quotation marks omitted) (quoting *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)); see also *Lilly v. Virginia*, 527 U.S. 116, 137 (1999) (noting the "long history of admitting such statements"); *Bourjaily v. United States*, 483 U.S. 171, 181 (1987) (rejecting defendant's argument that admission of co-conspirator statements violated his Confrontation Clause rights).

42. *White v. Illinois*, 502 U.S. 346, 352 (1992) (alteration in original) (quoting *Ohio v. Roberts*, 448 U.S. 56, 68 n.9. (1980)).

43. *Crawford v. Washington*, 124 S. Ct. 1354, 1374 (2004). In *Barber v. Paige*, 390 U.S. 719 (1968), the Court reaffirmed the requirement that a prosecutor must show that the witness was unavailable before his or her testimony from a preliminary hearing could be admitted, even if the witness had been cross-examined at the prior proceeding, *id.* at 724-26. Similarly, the Court in *California v. Green*, 399 U.S. 149 (1970), allowed testimony from a preliminary hearing even though the witness subsequently recanted her statement, *id.* at 164. A witness who testified at the trial admitted making the statements, and was cross-examined regarding both his testimony and preliminary hearing testimony; this satisfied Confrontation Clause demands. See Chase, *supra* note 27, at 1043.

2. Mired in Exceptions

The Court began to move onto new ground in *Ohio v. Roberts*,⁴⁴ where it abandoned a *per se* requirement for direct confrontation as a constitutionally prescribed method for determining reliability.⁴⁵ Truth-finding remained a core value of the Confrontation Clause, but the defendant's categorical right to confront the witness was now seen as only one means of assessing whether the testimony was reliable.⁴⁶ The Confrontation Clause was treated more like a rule of evidence than a constitutional demand.⁴⁷

In *Roberts*, the Court articulated a two-prong test for determining the reliability of testimony.⁴⁸ The first prong was the familiar rule of necessity, "requir[ing] the prosecutor to either produce, or demonstrate the unavailability of, the person whose out-of-court statement the prosecutor wished to use against a criminal defendant."⁴⁹ The second prong expanded the options for demonstrating reliability.⁵⁰ Once the witness's unavailability was established, the statement would be admissible if it had "adequate 'indicia of reliability,' [which could] be inferred . . . where the evidence falls within a firmly rooted hearsay exception . . . [or with] a showing of particularized guarantees of

44. 448 U.S. 56 (1980). In *Roberts*, the defendant was charged with check forgery and possession of stolen credit cards. *Id.* at 58. During a preliminary hearing, his attorney called the victim's daughter as a witness and attempted to get her to admit that she had given the checkbook and credit cards to the defendant without telling him that she did not have permission to use them. *Id.* At trial, the prosecution successfully admitted the daughter's prior testimony into the record based on a state law hearsay exception "permit[ting] the use of preliminary examination testimony of a witness who 'cannot for any reason be produced at trial.'" *Id.* at 59 (quoting OHIO REV. CODE ANN. § 2945.49 (1975)).

45. *Id.* at 62-65; Chase, *supra* note 27, at 1043-44.

46. *Roberts*, 448 U.S. at 63 n.6 (discussing the interplay between cross-examination, the oath, adversarial setting, and the demeanor of the witness to determine reliability).

47. See, e.g., Friedman, *supra* note 8, at 477 (noting that "[t]he Court clearly articulated the policy driving this balancing test: 'every jurisdiction has a strong interest in effective law enforcement, and in the development and precise formulation of the rules of evidence applicable in criminal proceedings'" (quoting *Roberts*, 448 U.S. at 64)).

48. *Roberts*, 448 U.S. at 65-66; see also Chase, *supra* note 27, at 1043-47 (describing the *Roberts* test).

49. Chase, *supra* note 27, at 1044-45.

50. *Id.* at 1045-46. While treated in *Roberts* as a conjunctive test, subsequent rulings made clear that the reliability prong was the "primary condition" because the unavailability of the declarant was only required if the out-of-court statement was testimonial. See *id.* at 1051-52 (discussing *United States v. Inadi*, 475 U.S. 387 (1986)); see also Friedman, *supra* note 16, at 5 (noting that "[t]he primary condition to be satisfied [under *Roberts*] was that the statement be reliable").

trustworthiness.”⁵¹ What was meant by a “firmly rooted hearsay exception” or “particularized guarantees of trustworthiness” remained “amorphous.”⁵²

Roberts set the stage for a confrontation within the Court over the “irreducible demands” of the Confrontation Clause.⁵³ Justice Scalia’s originalist view required direct confrontation between the accused and a witness offering adverse testimonial statements.⁵⁴ Justice O’Connor, conversely, argued that this was a constitutional “preference” that “may give way . . . to other competing interests.”⁵⁵

The dichotomy within the Court is most clear in two cases—*Coy v. Iowa*⁵⁶ and *Maryland v. Craig*⁵⁷—involving procedural techniques to

51. *Roberts*, 448 U.S. at 66. Compare *White v. Illinois*, 502 U.S. 346, 356-57 (1992) (allowing spontaneous declarations and statements made for medical treatment as a “firmly rooted” hearsay exception), with *Idaho v. Wright*, 497 U.S. 805, 817 (1990) (finding that a residual hearsay exception was by definition not “firmly rooted” because it requires a case specific, ad hoc assessment of the circumstances in which the statement was made). Although the Court established the firmly rooted hearsay exception in *Roberts*, the witness in that case in fact had been subject to defense counsel’s adversarial questioning. *Roberts*, 448 U.S. at 58. Called as a defense witness in the preliminary proceedings, the witness refused defense counsel’s persistent efforts to get her to admit to her earlier claim that she gave the credit cards and checkbook to the defendant without telling him that she did not have permission to use them. *Id.* While the opportunity for cross-examination was not directly at issue in *Roberts*, the Court nonetheless took the opportunity in its opinion to rule that mere opportunity for cross-examination was sufficient. *Id.* at 70.

52. *Crawford v. Washington*, 124 S. Ct. 1354, 1371 (2004). In *Lilly v. Virginia*, the Court said a “firmly rooted” hearsay exception was found when “‘longstanding judicial and legislative experience’” indicated that the statement “‘rest[s] on such [a] solid foundation[n] that admission of virtually any evidence within [it] comports with the ‘substance of the constitutional protection.’” 527 U.S. 116, 126 (1999) (alterations in original) (internal quotation marks omitted) (quoting *Wright*, 497 U.S. at 817); *Roberts*, 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)). This standard provides little specific guidance to lower courts, except to indicate that one factor is the length of time the exception has been recognized. *See id.* Yet, how long was sufficient and what was needed to find an adequately solid foundation remained ambiguous. Friedman, *supra* note 16, at 6 (noting that the lower courts “strained” to follow the Court’s guidelines, but reached far different results on analogous facts).

53. *See infra* text accompanying notes 59-67.

54. Compare *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988) (“We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”), with *Crawford*, 124 S. Ct. at 1374 (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

55. *Coy*, 487 U.S. at 1022 (O’Connor, J., concurring); *id.* at 1024 (O’Connor, J., concurring) (“The Court has time and again stated that the Clause ‘reflects a preference for face-to-face confrontation at trial,’ and expressly recognized that this preference may be overcome in a particular case if close examination of ‘competing interests’ so warrants.” (quoting *Roberts*, 448 U.S. at 63-64)).

56. 487 U.S. 1012 (1988).

protect child witnesses from the trauma of testifying before their alleged abusers.⁵⁸ Justice Scalia wrote for the Court in *Coy*, reasserting that the “the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”⁵⁹

That Justice Scalia’s opinion was only a pyrrhic victory became evident two years later when Justice O’Connor drafted the Court’s opinion in *Craig*. Writing for a five to four majority in *Craig*,⁶⁰ she reasserted that face-to-face confrontation was “not the *sine qua non* of the . . . right”⁶¹ as long as there were other means of testing reliability.⁶²

Justice O’Connor advocated a case-specific inquiry to show that foregoing direct confrontation with the defendant was necessary to protect a sufficiently important public interest.⁶³ She noted that a significant majority of state legislatures enacted procedures allowing children to avoid direct interaction with their alleged abusers, and the Court should not second-guess their considered judgment.⁶⁴

57. 497 U.S. 836 (1990).

58. *Craig*, 497 U.S. at 841-43; *Coy*, 487 U.S. at 1014-15. The defendants in both cases were charged with child abuse, but the procedures used to shield child-witnesses differed. State law in *Coy* permitted a screen to be placed at trial between the accused and the child witnesses. 487 U.S. at 1014. The defendant could dimly see the children after the courtroom lights were lowered, but the children could not see the defendant. *Id.* at 1014-15. Defense counsel was able to cross-examine the witnesses, and the judge and jury could see their demeanor as they answered questions. *Id.* The defendant in *Craig* challenged the use of one-way closed circuit television to prevent the child witness from having to testify in his presence. 497 U.S. at 840-42. The prosecutor and defense counsel questioned the witness while in the same room with her, but the judge, jury, and the defendant remained in the courtroom. *Id.* at 841. The defendant and the jury could see the witness’s demeanor from a video monitor when she answered questions; she, however, could not see the defendant. *Id.* at 841-42.

59. *Coy*, 487 U.S. at 1016. Justice Scalia acknowledged that the Court had found exceptions to rights deemed implicit in the Clause, citing the general exclusion of hearsay and the right to face-to-face confrontation at points other than at trial. *Id.* at 1020. However, he said that was far different than finding exceptions to the “irreducible literal meaning of the Clause: ‘a right to *meet face to face* all those who appear and give evidence at trial.’” *Id.* at 1021 (quoting *California v. Green*, 399 U.S. 149, 175 (1970) (Harlan, J., concurring)). Foreshadowing the position she would take in *Craig*, Justice O’Connor wrote separately “only to note [her] view that [the right to face to face confrontation was] not absolute, but rather may give way . . . to other competing interests.” *Id.* at 1022 (O’Connor, J., concurring).

60. *Craig*, 497 U.S. at 838.

61. *Id.* at 847.

62. *Id.* at 853-54. In Justice O’Connor’s opinion, physical presence, oath, cross-examination, and demeanor together “ensur[e] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings.” *Id.* at 846.

63. *Id.* at 844-45, 857-58.

64. *Id.* at 855. Justice Scalia, joined by the remaining justices from the *Coy* majority, categorically rejected the Court’s holding. *Id.* at 860 (Scalia, J., dissenting); *Coy v. Iowa*,

Craig bolstered the use of the *Roberts* test as a framework for assessing Confrontation Clause challenges,⁶⁵ but state and lower federal courts struggled to find coherence in its application.⁶⁶ Even the Supreme Court had difficulty finding consensus when applying the test.⁶⁷

B. Reasserting the Constitutional Command

The procedural history of *Crawford v. Washington*⁶⁸ highlighted the lack of coherent guidelines to apply the reliability prong of the *Roberts* test.⁶⁹ Michael Crawford was charged with assault and attempted murder after attacking a man who allegedly attempted to rape his wife, Sylvia.⁷⁰ Both Sylvia and Michael made recorded confessions to the police shortly after the attack.⁷¹ Sylvia was unavailable to testify at Michael's trial because of Washington's spousal privilege law, prohibiting the testimony

487 U.S. 1012, 1013 (1988). He scathingly asserted that "[s]eldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion." *Craig*, 497 U.S. at 860. Justice Scalia asserted that "the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to assure reliable evidence, undeniably among which was 'face-to-face' confrontation." *Id.* at 862 (Scalia, J., dissenting). By treating equally the Clause's explicit and implicit means for determining reliability, the Court "abstracts from the right to its purposes, and then eliminates the right." *Id.* (Scalia, J., dissenting)

65. See Chase, *supra* note 27, at 1017.

66. See Penny J. White, *Rescuing the Confrontation Clause*, 54 S.C. L. REV. 537, 617-18 (2003). Writing before the *Crawford* decision, the author argued that the Court's Confrontation Clause rulings were both "confusing and inconsistent." *Id.* at 617. She advocated "[a] more easily understood and universal approach to ease the burden of trial and appellate judges" and lawyers "on both sides of the criminal justice system." *Id.*; see also Friedman, *supra* note 8, at 501-05. Friedman notes that by the early 1990s, the Court's Confrontation Clause rulings were "muddied waters." *Id.* at 490. While Justices Scalia and Thomas advocated originalist approaches, Justice O'Connor, sometimes joined by Chief Justice Rehnquist, still looked to a *Roberts*-based standard, broadening Confrontation Clause standards to either "protect[] vulnerable witnesses (as in *Craig*)" or developing "other methods of ensuring reliability." *Id.* The other justices vacillated between the two schools of thought, "offer[ing] little guidance for future decisions, either in lower courts or for the Supreme Court itself." *Id.*

67. See Joshua C. Dickinson, *The Confrontation Clause and the Hearsay Rule: The Current State of a Failed Marriage in Need of a Quick Divorce*, 33 CREIGHTON L. REV. 763, 765 (2000). Dickinson describes the justices following the *Lilly* ruling as "discordant." *Id.* He notes that in *Lilly*, the justices wrote four separate concurring opinions. *Id.* at 795-96; see also Friedman, *supra* note 8, at 505 (noting that although the Court in *Lilly* heightened Confrontation Clause standards by disallowing co-conspirator statements, "the circuits [were still] left to develop their own rules of law, providing little sense of precedent or reliability for those who follow").

68. 124 S. Ct. 1354 (2004).

69. *Id.* at 1372-73.

70. *Id.* at 1356-57.

71. *State v. Crawford*, 54 P.3d 656, 658 (Wash. 2002), *rev'd sub nom. Crawford v. Washington*, 124 S. Ct. 1354 (2004).

of one spouse without the other's consent.⁷² However, the court allowed the prosecutor to use Sylvia's recorded statements based on a state hearsay exception for statements against penal interest and the "sufficient indicia of reliability" standard of the *Roberts* test.⁷³

The Washington Court of Appeals disagreed with the trial court and reversed Michael's conviction, concluding that Sylvia's testimony lacked the requisite indicia.⁷⁴ Finally, the Washington Supreme Court reinstated the conviction because, in its judgment, "the interlock[]" between the two confessions enhanced the reliability of her statement.⁷⁵

On certiorari, the Supreme Court chose not to join sides in the Washington state courts' oscillating assessments regarding the trustworthiness of Sylvia's statement, but instead broke with the *Roberts* test altogether.⁷⁶ Writing for the Court, Justice Scalia found that the lesson of *Crawford* is that the "[*Roberts*]" framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations.⁷⁷ Sylvia's statements to the police were precisely the type of ex parte statement the Framers enjoined.⁷⁸

Justice Scalia notes that the Constitutional text is insufficient to define the scope of Confrontation Clause demands.⁷⁹ History showed that "the principal evil at which the Confrontation Clause was directed was the . . . use of ex parte examinations as evidence against the accused."⁸⁰ Recalling the Framers' knowledge of English history and the Crown's infamous use of ex parte statements against the American colonies, Justice Scalia argued that the Framers "would not have allowed admission of testimonial statements of a witness who did not appear at

72. *Id.* (citing WASH. REV. CODE § 5.60.060 (2001)). The Washington statute states that

[a] husband shall not be examined for or against his wife, without the consent of the wife, nor a wife for or against her husband without the consent of the husband; nor can either during marriage or afterward, be without the consent of the other, examined as to any communication made by one to the other during marriage.

Id.

73. *Id.* at 663.

74. *Crawford v. Washington*, 124 S. Ct. 1354, 1358 (2004).

75. *Id.*

76. *Id.* at 1372-74.

77. *Id.* at 1371.

78. *Id.* at 1365 n.4. Compare *Bourjaily v. United States*, 483 U.S. 171, 173-74 (1987), where the court allowed tape recorded co-conspirator statements because such statements are not considered hearsay under FED. R. EVID. 804(d)(2)(E).

79. *Crawford*, 124 S. Ct. at 1359. According to Justice Scalia, the term "witnesses against" may plausibly mean "those who actually testify at trial, those whose statements are offered at trial, or something in-between." *Id.* (citations omitted).

80. *Id.* at 1363.

trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”⁸¹ Rejecting the *Roberts* approach, Justice Scalia affirmed that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”⁸²

C. Crawford's *Unanswered Questions*

While the Court's opinion in *Crawford* brought clarity to the requirements for admitting some hearsay, the Court failed to address significant questions.⁸³ Justice Scalia's acknowledged failure to define “testimonial statements” received the greatest scrutiny from practitioners and academics⁸⁴ and is likely to “plague judges for years.”⁸⁵

Crawford provided some guidance for identifying “[v]arious formulations of [the] core class of ‘testimonial’ statements.”⁸⁶ The presumably nonexclusive formulations Justice Scalia provides are:

ex parte [statements] . . . such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine . . . ; extra-judicial statements . . . contained in formalized testimonial materials, such as . . . depositions, prior

81. *Id.* at 1363-65. Justice Scalia points out that the Framers added the Confrontation Clause to the Bill of Rights to rectify its omission from the Constitution. *Id.* at 1362-63. Moreover, many state declarations of rights adopted in the Revolutionary period guaranteed a defendant the right to confront adverse witnesses. *Id.*; see also Berger, *supra* note 4, at 583-85 nn.108-13 (discussing Anti-federalist argument that a confrontation right was necessary to “curb tyranny”). Professor Berger notes that George Mason raised similar concerns during ratification of the Virginia Declaration of Rights. *Id.* at 584-86.

82. *Crawford*, 124 S. Ct. at 1374.

83. Friedman, *supra* note 16, at 8-10.

84. *Id.* at 9-11; see also Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 CATO SUP. CT. REV. 439, 456, WL 2004 CATOSCTR 439 (commenting that “the boundaries of the category [of testimonial statements] will have to be marked out by future cases”); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 316, 321 (2004), WL 118 HVLR 316 (noting that “even as it concluded that the Confrontation Clause was directed primarily at testimonial statements, the decision did not define what constitutes testimony”).

85. Chemerinsky, *supra* note 14, at 82. In his concurring opinion, Chief Justice Rehnquist argued that the omission “casts a mantle of uncertainty over future criminal trials in both federal and state courts.” *Crawford*, 124 S. Ct. at 1374 (Rehnquist, C.J., concurring in the judgment). While Justice Scalia suggests that Confrontation Clause protection may apply only to testimonial statements, the opinion refrains from adopting that position. See *id.* at 1374. He focuses instead on what is required when testimonial statements—whatever they may be—are at issue. *Id.* at 1373-74. A number of commentators suggest that Justice Scalia may have avoided a precise definition as a compromise for unanimity in the Court's judgment. See, e.g., Friedman, *supra* note 16, at 13.

86. *Crawford*, 124 S. Ct. at 1364.

testimony, or confessions; and statements that were made [with the reasonable expectation that they] would be available for use at a later trial.⁸⁷

Statements made to police officers during interrogation presumably fit within all three categories “under even a narrow standard . . . [because they] bear a striking resemblance” to the specific types of ex parte statements the Framers found repugnant.⁸⁸

Crawford also fails to provide a standard by which to judge the sufficiency of an opportunity for cross-examination.⁸⁹ The testimonial approach adopted in *Crawford* “demands . . . a prior opportunity for cross-examination” before an absent witness’s testimony may be admitted at trial.⁹⁰ Yet the Court did not definitively answer whether depositions, interrogatories, or similar techniques satisfy the sufficient opportunity for cross-examination test.⁹¹

Finally, the testimonial approach the Court adopted may indicate when a witness qualifies as unavailable to testify at trial.⁹² Under *Roberts* and its progeny, the Court developed a body of case law regarding the

87. Friedman, *supra* note 16, at 9 (third omission in original) (internal quotations marks and citations omitted); see *Crawford*, 124 S. Ct. at 1364.

88. *Crawford*, 124 S. Ct. at 1364. Moreover, the Court’s previous rulings indicate that a finding that the statements were taken without intent to use them in a future prosecution does not immunize them from Confrontational Clause challenges. See, e.g., *White v. Illinois*, 502 U.S. 346, 355-56 (1992). Justice Thomas’s concurrence in *White* focused on the form of the statements rather than the circumstances under which it was taken. *Id.* at 364 (Thomas, J., concurring in part and concurring in the judgment). He argued that “[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties.” *Id.* (Thomas, J., concurring in part and concurring in the judgment). In language Justice Scalia would mirror in *Crawford*, Justice Thomas would apply a stricter standard to “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.” *Id.* at 365 (Thomas, J., concurring in part and concurring in the judgment).

89. See *Ohio v. Roberts*, 448 U.S. 56, 70 (1980). In *Roberts*, the Court suggested in dicta that “the opportunity to cross-examine [the witness] . . . satisfies the Confrontation Clause.” *Id.* But cf. Friedman, *supra* note 16, at 11 (describing scenarios raising whether the accused’s opportunity to cross-examine was adequate).

90. *Crawford*, 124 S. Ct. at 1374.

91. Chase, *supra* note 27, at 1056-57. This is of particular concern in child abuse cases, where, over Justice Scalia’s dissent, the Court has shown greater flexibility in according child-witnesses alternative ways to testify short of facing their alleged abuser. See *supra* notes 56-64 and accompanying text. In the aftermath of *Crawford*, resolution of these opposing standards may limit use of alternative methods for providing testimony. Recently in *Snowden v. State*, 846 A.2d 36 (Md. 2004), the Maryland Court of Special Appeals cited *Crawford* in overturning a conviction where the trial court used a state tender-age hearsay exception to admit the child’s prior statements to a social worker in lieu of her testimony, *id.* at 42-43.

92. See *infra* text accompanying notes 96-98.

adequacy of proof for unavailability.⁹³ While usually requiring that the prosecutor explore all avenues to produce the witness, the Court's ruling in *Mancusi v. Stubbs*⁹⁴ set the outer perimeter.⁹⁵ In *Mancusi*, the Court concluded that use of prior testimony of a witness living in a foreign country did not violate the Confrontation Clause.⁹⁶

Mancusi may not apply to witnesses held abroad under U.S. custody.⁹⁷ The jurisdiction of federal courts may reach these witnesses because the subpoena issues against the detainee's custodian, so long as that custodian is a U.S. citizen.⁹⁸ It is only when that custodian defies the subpoena that the witnesses become "unavailable."⁹⁹

II. CRAWFORD AND THE COURT'S POST SEPTEMBER 11 JURISPRUDENCE

Two cases illustrate how the Court might apply *Crawford* in terrorism prosecutions: *Hamdi v. Rumsfeld*¹⁰⁰ and *United States v. Moussaoui*.¹⁰¹ *Hamdi* provides a specific test of the Court's treatment of out-of-court testimonial statements in a U.S. citizen's challenge to his detention as an enemy combatant.¹⁰² A more comprehensive examination of *Crawford* comes from the proceedings in *Moussaoui*, which address access to the testimony of enemy combatants who may have exculpatory evidence.¹⁰³ While the Sixth Amendment's mirror right to compulsory process¹⁰⁴ is the

93. See Friedman, *supra* note 16, at 8.

94. 408 U.S. 204, 209, 216 (1972) (finding that a witness who testified at a prior hearing but was now living in Sweden was unavailable because he was beyond the court's process powers).

95. Friedman, *supra* note 16, at 8.

96. *Mancusi*, 408 U.S. at 212-13.

97. *United States v. Moussaoui*, 382 F.3d 453, 465 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (2005).

98. *Id.*

99. *Moussaoui*, 382 F.3d at 463-64; *cf.* *Rasul v. Bush*, 124 S. Ct. 2686, 2698 (2004) (finding that a district court has jurisdiction over the habeas claims of alien detainees held at Guantanamo Bay, where the United States has exclusive and plenary jurisdiction, but not ultimate sovereignty).

100. 124 S. Ct. 2633 (2004).

101. 382 F.3d 453 (4th Cir 2004), *cert. denied*, 73 U.S.L.W. 3556 (2005).

102. *Hamdi*, 124 S. Ct. at 2635-39 (plurality opinion). In the aftermath of the Supreme Court's ruling, discussed *supra*, Hamdi's habeas action was dismissed. Stipulation of Dismissal, *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527 (E.D.Va. 2002) (No. 2:02CV439). He agreed as part of a settlement with the Government to renounce his U.S. citizenship after being deported to Saudi Arabia. Joel Brinkley & Eric Lichtblau, *U.S. Releases Saudi-American It had Captured in Afghanistan*, N.Y. TIMES, Oct. 12, 2004, at A15. Nonetheless, his case is illustrative of the standard the Court may apply in considering the admissibility of unchallenged hearsay in enemy combatant hearings.

103. *Moussaoui*, 382 F.3d at 458.

104. *Id.* at 483 (Gregory, J., concurring in part and dissenting in part).

focus in *Moussaoui*, the admission of testimonial hearsay also implicates *Crawford* considerations.¹⁰⁵

A. Hamdi—*Exigencies of War and Testimonial Hearsay*

Hamdi provides a window on how the Court is likely to apply *Crawford* in determining whether the submission of an affidavit “based on third-hand hearsay” in terrorism cases comports with the requirements of the Confrontation Clause.¹⁰⁶

Yaser Hamdi was born in the United States and moved to Saudi Arabia as a child.¹⁰⁷ By 2001 he was living in Afghanistan, where anti-Taliban forces seized him and turned him over to the U.S. military.¹⁰⁸ Classified as an enemy combatant, the military sent Hamdi to brigades in Virginia and South Carolina after learning that he was a U.S. citizen.¹⁰⁹ In June 2002 Hamdi’s father filed a petition for a writ of habeas corpus challenging his son’s designation as an enemy combatant—a status that the Government claimed allowed the military to detain him indefinitely without formal charges or proceedings.¹¹⁰

In defending Hamdi’s designation as an enemy combatant, the Government relied exclusively on a two-page declaration from a Department of Defense Special Advisor.¹¹¹ The Special Advisor had neither first-hand knowledge of Hamdi’s case, nor had he talked to those who did.¹¹² Hamdi’s affiliation with the Taliban rested on the statements of an unknown anti-Taliban combatant “who communicated it to someone in the U.S. military.”¹¹³ The district court found the declaration insufficient; the Government appealed.¹¹⁴

The Fourth Circuit reversed, holding that because Hamdi was captured in a foreign war zone, he was not entitled to a factual inquiry to challenge his detention.¹¹⁵ Moreover, the circuit court found the Government’s

105. *Id.* at 480-82.

106. *Hamdi*, 124 S. Ct. at 2644 (plurality opinion).

107. *Id.* at 2635 (plurality opinion).

108. *Id.* at 2635-36 (plurality opinion).

109. *Id.* at 2636 (plurality opinion).

110. *Id.* (plurality opinion).

111. *Id.* at 2636-37 (plurality opinion).

112. *Id.* at 2637 (plurality opinion).

113. Brief for Petitioner at *4 n.4, *Hamdi* (No. 03-6696), 2004 WL 378715. The declarant asserted that “he [had] been ‘substantially involved with matters related to the detention of enemy combatants,’” and had “review[ed] . . . relevant records and reports . . . [pertaining] . . . to the capture of . . . Hamdi and his detention by military forces.” *Hamdi*, 124 S. Ct. at 2637 (fourth omission in original) (citations omitted) (plurality opinion).

114. *Hamdi*, 124 S. Ct. at 2637-38 (plurality opinion).

115. *Id.* at 2638 (plurality opinion). According to the circuit court, given the circumstances of Hamdi’s detention “the Constitution [did] not entitle him to a searching

declaration to be a sufficient factual basis to hold him even though the declaration was based entirely on third-hand hearsay.¹¹⁶ In short, Hamdi could not challenge his status so long as the Government produced “some evidence” to justify his classification.¹¹⁷

A badly divided Supreme Court remanded.¹¹⁸ Writing for a plurality, Justice O'Connor weighed Hamdi's due process rights against the Government's war-making authority.¹¹⁹ She concluded that a citizen detained as an enemy combatant is entitled to “notice of the factual basis for his classification and a fair opportunity to [challenge it] before a neutral decisionmaker.”¹²⁰

While ostensibly giving Hamdi his day in court, Justice O'Connor's plurality opinion conceded that “the exigencies of the circumstances may demand that . . . [the] proceedings be tailored to alleviate their uncommon potential to burden the Executive at a time of [war].”¹²¹ While rejecting the “some evidence” standard the Government advocated, she would allow an enemy combatant designation to stand based on a showing of “credible evidence.”¹²² Further, Justice O'Connor wrote, “[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government in such a proceeding.”¹²³ She would require only that “a knowledgeable affiant” summarize reports already collected “in the ordinary course of military affairs.”¹²⁴ Finally, the Government's evidence would enjoy a presumption in its favor, as long as the accused had the opportunity for rebuttal.¹²⁵

review of the factual determinations underlying his seizure [in Afghanistan].” *Id.* at 2639 (plurality opinion).

116. Brief for Petitioner at *10-11, *Hamdi* (No. 03-6696), 2004 WL 378715.

117. *Hamdi*, 124 S. Ct. at 2639 (plurality opinion).

118. *Id.* at 2634-35, 2652 (plurality opinion). Justice O'Connor delivered an opinion that Chief Justice Rehnquist and Justices Kennedy and Breyer joined. *Id.* at 2635. Justice Souter filed an opinion concurring in part, and concurring in the judgment that Justice Ginsburg joined. *Id.* at 2657. Justices Scalia, Stevens, and Thomas dissented. *Id.* at 2660, 2674.

119. *Id.* at 2647-48 (plurality opinion). The Court initially addressed “whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’” *Id.* at 2639 (plurality opinion). While the Court found the Government did have the authority, *id.* at 2640-41 (plurality opinion), discussion of this issue is beyond the scope of this Comment.

120. *Id.* at 2648 (plurality opinion).

121. *Id.* at 2649 (plurality opinion).

122. *Id.* (plurality opinion).

123. *Id.* (plurality opinion).

124. *Id.* (plurality opinion).

125. *Id.* (plurality opinion).

Four of the justices who took the hardest line in rejecting the Court's ruling came from the *Crawford* majority.¹²⁶ Writing for himself and Justice Stevens, Justice Scalia accused the Court of devising "an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a 'neutral' military officer."¹²⁷ He called for a straightforward reading of the Constitution's provision requiring congressional suspension of the writ of habeas corpus before the Government may detain an American citizen without charging him.¹²⁸ Unless Congress suspended the writ, Hamdi must be prosecuted on criminal charges or released.¹²⁹

B. Moussaoui: Of Testimonial Statements, Cross-examination, and the Unavailability of Witnesses

Zacarias Moussaoui was arrested in August 2001 after raising suspicions at a flight school in Oklahoma, and subsequently was indicted on charges relating to the terrorist attacks of September 11, 2001.¹³⁰ The Government alleged he was a member of the al-Qaeda terrorist organization and charged him with six terrorism related crimes, four of which carried the death penalty.¹³¹ Complying with its disclosure

126. Compare *id.* at 2652 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment), *id.* at 2660 (Scalia, J., dissenting), and *id.* at 2674 (Thomas, J., dissenting), with *Crawford v. Washington*, 124 S. Ct. 1354, 1356 (2004).

127. *Hamdi*, 124 S. Ct. at 2672 (Scalia, J., dissenting).

128. *Id.* at 2660-61 (Scalia, J., dissenting).

129. *Id.* at 2671 (Scalia, J., dissenting). Justice Scalia was careful to limit his opinion to U.S. citizens "accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court." *Id.* at 2673. (Scalia, J., dissenting). However, "[w]here [a] citizen is captured outside and held outside United States, the constitutional requirements may be different." *Id.* at 2673 (Scalia, J., dissenting).

130. *United States v. Moussaoui*, 382 F.3d 453, 457 (4th Cir. 2004), *cert. denied* 73 U.S.L.W. 3556 (2005).

131. *Id.* at 457-58. The indictment charged "Moussaoui with six offenses: conspiracy to commit acts of terrorism transcending national boundaries; conspiracy to commit aircraft piracy; conspiracy to destroy aircraft; conspiracy to use weapons of mass destruction; conspiracy to murder United States employees[;] and conspiracy to destroy property." *Id.* (citations omitted). The first four carry the death penalty. *Id.* The prosecution, however, did not identify Moussaoui as the so-called twentieth hijacker. See Toni Locy, *Moussaoui Case Prosecutors Have Fifth-Plane Theory*, USA TODAY, Apr. 24, 2003, at 5A, LEXIS, News Library, Usatdy File. As this Comment was going to print, Moussaoui pleaded guilty to all charges against him. Jerry Markon, *Moussaoui Pleads Guilty in Terror Plot*, WASH. POST, Apr. 23, 2005, at A1. A month earlier, the Supreme Court denied Moussaoui's petition for an interlocutory review of the Fourth Circuit's refusal to order his direct access to key al Qaeda witnesses. David Strout, *High Court Won't Hear Moussaoui's Appeal*, N.Y. TIMES, Mar. 21, 2005, <http://www.nytimes.com/2005/03/21/politics/21cnd-moussaoui.html?cx=1114488000&en=a598a3c0ac779ac4&ei=5070>. Moussaoui's guilty plea foreclosed subsequent Supreme Court review following a

obligations,¹³² the prosecution provided Moussaoui's defense team with classified summaries of statements from alleged al-Qaeda leaders held as enemy combatants at undisclosed locations overseas.¹³³ As the Fourth Circuit noted, the detainees were assumed to be in military custody.¹³⁴

Moussaoui alleged that the statements showed the witnesses would provide exculpatory information if allowed to testify.¹³⁵ The Government objected to granting him access to the witnesses, citing a host of national security concerns including preventing further attacks and avoiding bolstering other terrorist operatives.¹³⁶ For nearly two years, Moussaoui's right to pretrial access was litigated in both the district court and the Court of Appeals for the Fourth Circuit.¹³⁷ Both courts looked to the Classified Information Procedures Act (CIPA)¹³⁸ as the most

trial, leaving open in other circuits the issue of the scope of Sixth Amendment confrontation rights under analogous circumstances. Moreover, Moussaoui must still face a penalty phase hearing. Whether confrontation is required during this phase is uncertain. See *Blakley v. Washington*, 124 S. Ct. 2531, 2561 (2004) (Breyer, J., dissenting); see also Joshua Herman, Comment, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1858 n.615, 1870 (2004).

132. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (finding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

133. *Moussaoui*, 382 F.3d at 458-59.

134. *Id.* at 465. The Government authorized the National Commission on Terrorist Attacks upon the United States (The 9/11 Commission) to release the names of ten detainees "whose custody has been confirmed officially by the U.S. government." NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 146 (2004), available at <http://www.9-11commission.gov/report/911Report.pdf>. They are

Khalid Sheikh Mohammed, Abu Zubaydah, Riduan Isamuddin (also known as Hambali), Abd al Rahim al Nashiri, Tawfiq bin Attash (also known as Khallad), Ramzi Binalshibh, Mohamed al Kahtani, Ahmad Khalil Ibrahim Samir al Ani, Ali Abd al Rahman al Faqasi al Ghamdi (also known as Abu Bakr al Azdi), and Hassan Ghul.

Id. at 488 n.2. The Government maintains that the identities of the specific detainees Moussaoui sought to question remain classified. *Moussaoui*, 382 F.3d at 456 n.1.

135. *Moussaoui*, 382 F.3d at 458; see also Brief of the Appellee at 48-63, *Moussaoui* (No. 03-4792), available at 2003 WL 22767608.

136. *Moussaoui*, 382 F.3d at 470 (asserting that granting the request would impede ongoing questioning that could prevent further attacks and harm U.S. foreign relations); see also Brief for the United States at 43-45, *Moussaoui*, (No. 03-4792), available at 2003 WL 22519704. The prosecution argued that al Qaeda trained its operatives to exploit the U.S. legal system, for example, by making fabricated claims of torture. *Id.* at 44. Prosecutors argued that granting Moussaoui access to the detainees would show other terrorists how to impede their own trials if captured by forcing the Government to choose between "effective intelligence gathering and effective prosecution." *Id.*

137. *Moussaoui*, 382 F.3d at 458-61.

138. 18 U.S.C. app. 3 §§ 1-16 (2000). The Classified Information Procedures Act (CIPA) governs the handling of classified material in judicial proceedings. Pub. L. No. 96-

456, 94 Stat. 2025, 2025 (1980). Enacted in 1980, Congress designed CIPA to protect the Government from “graymail,” where a defendant might threaten to raise classified information during his trial, creating a “disclose or dismiss dilemma” for the Government. See *United States v. Hammoud*, 381 F.3d 316, 338 (4th Cir. 2004). It does not provide additional discovery rights, but instead is a procedural device within the general discovery rules to limit the manner with which classified information is disclosed “based on the sensitive nature of the classified information.” Mark D. Villaverde, Note, *Structuring the Prosecutor’s Duty To Search the Intelligence Community for Brady Material*, 88 CORNELL L. REV. 1471, 1477 n. 25 (2003) (quoting *United States v. Yunis*, 867 F.2d 617, 621 (D.C. Cir. 1989)). CIPA, in pertinent section, provides:

At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. . . . No admission made by the defendant or by any attorney for the defendant at such a conference may be used against the defendant unless the admission is in writing and is signed by the defendant and by the attorney for the defendant.

§ 3. Protective Orders

Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

....

§ 5. Notice of defendant’s intention to disclose classified information

(a) . . . [A] defendant [who] reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant . . . shall . . . notify the attorney for the United States and the court in writing. Such notice shall include a brief description of the classified information. . . . No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until . . . the United States has been afforded a reasonable opportunity to seek a determination [concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding].

....

§ 6. Procedures for cases involving classified information

(a) . . . [T]he United States may request the court to conduct a hearing to make all determinations concerning the use, relevance, or admissibility of classified information that would otherwise be made during the trial or pretrial proceeding. Upon such a request, the court shall conduct such a hearing. Any hearing held pursuant to this subsection . . . shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information. . . . [T]he court shall rule prior to the commencement of the relevant proceeding.

....

(c) . . . (1) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(B) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information. . . .

(2) The United States may . . . submit to the court an affidavit of the Attorney General certifying that disclosure of classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

....
(e) . . . (1) Whenever the court denies a motion by the United States that it issue an order . . . and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified information at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(2) Whenever a defendant is prevented by an order . . . from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information; except that, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include, but need not be limited to—

- (A) dismissing specified counts of the indictment or information;
- (B) finding against the United States on any issue as to which the excluded classified information relates; or
- (C) striking or precluding all or part of the testimony of a witness.

....
(f) . . . Whenever the court determines . . . that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. . . .

§ 7. Interlocutory appeal

(a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case authorizing the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information.

§ 8. Introduction of classified information

....
(c) . . . During the examination of a witness in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the United States to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

analogous statutory framework for reconciling the conflict between Moussaoui's Sixth Amendment fair trial rights and the Government's legitimate efforts to protect national security interests.¹³⁹ Under CIPA, the Government may furnish substitutions that "provide the defendant with substantially the same ability to make his defense as would disclosure of the . . . classified information."¹⁴⁰

Both courts also agreed that the Government's concerns precluded hauling the witnesses into court,¹⁴¹ but they clashed over the appropriate remedy.¹⁴² The district court found the substitutions the Government proposed to be unreliable, incomplete, and inaccurate.¹⁴³ Instead, the judge ordered that the parties depose the witnesses under Rule 15 of the Federal Rules of Criminal Procedure.¹⁴⁴ Acknowledging some of the

18 U.S.C. app. 3 §§ 2, 3, 5(a), 6(a), (c), (e), (f), 7(a), 8(c) (2000).

139. *Moussaoui*, 382 F.3d at 471 n.20 (finding that although "CIPA does not apply [to defendant access to detainee-witnesses] . . . [it] provides a useful framework for considering the questions raised").

140. 18 U.S.C. app. 3 § 6 (2000).

141. *Moussaoui*, 382 F.3d at 458, 476.

142. *Id.* at 477-78. Compare *United States v. Moussaoui*, No. CRIM. 01-455-A, 2003 WL 21277161, at *1 (E.D. Va. May 15, 2003) (explaining that the Fourth Circuit Court of Appeals rejected the district court's order requiring the Government to produce detainee-witness for video-taped depositions), with *Moussaoui*, 382 F.3d at 479-80 (requiring the district court to work with the prosecution and defense to fashion the substitute statements the district court ordered to be offered in lieu of video-taped depositions).

143. *Moussaoui*, 2003 WL 21277161, at *2-3; see *Moussaoui*, 382 F.3d at 477-79.

144. *Moussaoui*, 382 F.3d at 456. Rule 15 provides:

(1) In General. A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice. . . .

(2) Detained Material Witness. A witness who is detained . . . may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the witness has signed under oath the deposition transcript.

(b) Notice.

(1) In General. A party seeking to take a deposition must give every other party reasonable written notice of the deposition's date and location. The notice must state the name and address of each deponent. If requested by a party receiving the notice, the court may, for good cause, change the deposition's date or location.

(2) To the Custodial Officer. A party seeking to take the deposition must also notify the officer who has custody of the defendant of the scheduled date and location.

(c) Defendant's Presence.

(1) Defendant in Custody. The officer who has custody of the defendant must produce the defendant at the deposition and keep the defendant in the witness's presence during the examination, unless the defendant:

(A) waives in writing the right to be present; or

(B) persists in disruptive conduct justifying exclusion after being warned by the court that disruptive conduct will result in the defendant's exclusion.

Government's concerns, she invoked Rule 15(b)(1) to authorize using a remote video hook up with a time delay to take the depositions.¹⁴⁵

The Fourth Circuit, conversely, found the Government-prepared summaries of the inculpatory statements sufficient to protect Moussaoui's constitutional rights.¹⁴⁶ The court also said that Moussaoui should have the same, limited opportunity to have his questions posed to the witnesses as the Government had.¹⁴⁷ In practical terms, this meant that Moussaoui would not know if or how his submitted questions were asked, nor would he be able to ask follow up questions.¹⁴⁸ His answers would come from summaries of reports that the Government prepared for the intelligence community at large.¹⁴⁹

The Fourth Circuit acknowledged that the substitutions would not completely leave Moussaoui in the position he would be in if the witnesses testified.¹⁵⁰ Still, the circuit court said that the substitutions provided "sufficient indicia of reliability" for admission.¹⁵¹ Specifically, said the court, those who originally produced the summaries "have a profound interest in obtaining accurate information from the witnesses and in reporting that information accurately to those who can use it to

....
(e) Manner of Taking. Unless these rules or a court order provides otherwise, a deposition must be taken and filed in the same manner as a deposition in a civil action, except that:

....
(2) The scope and manner of the deposition examination and cross-examination must be the same as would be allowed during trial.

(3) The government must provide to the defendant . . . any statement of the deponent in the government's possession to which the defendant would be entitled at trial.

(f) Use as Evidence. A party may use all or part of a deposition as provided by the Federal Rules of Evidence.

FED. R. CRIM P. 15(a)-(b), (c)(1), (e)-(f).

145. *Moussaoui*, 382 F.3d at 458; see Jerry Seper, *Appeals Court Rejects U.S. Effort To Block Moussaoui*, WASH. TIMES, June 27, 2003, at A3; see also Associated Press, *Feds: Moussaoui Judge Out of Bounds*, CBSNEWS.COM, Apr. 24, 2003, at <http://www.cbsnews.com/stories/2002/07/22/attack/main515896.shtml>. The time delay would allow the court to prevent transmissions of impermissible questions. *Id.*

146. *Moussaoui*, 382 F.3d at 482. While the Fourth Circuit was deliberating, the Government sent a letter to the judges clarifying that members of the prosecution team had provided information or suggested lines of inquiry to be used with the detainees. *Id.* at 460. While it appears that the court was not aware of this, nothing in the court's opinion suggests that this was more than a misunderstanding. See *id.* at 479. However, the court found that the defendant was entitled to the same opportunity. *Id.*

147. *Id.*

148. *Id.* at 478 & n.29.

149. *Id.* at 458 n.5, 461-62.

150. *Id.* at 477.

151. *Id.* at 478.

prevent acts of terrorism and to capture other al Qaeda operatives.”¹⁵² Accordingly, the court ruled that the jury should be informed, inter alia, that the Government provided substitute testimony derived from statements the witnesses made “under conditions that provide circumstantial guarantees of reliability.”¹⁵³

A final issue the court addressed dealt head-on with Moussaoui’s confrontation rights.¹⁵⁴ Under the rule of completeness, the Government asserted that the court must allow it to supplement the statements Moussaoui sought to admit with other, contextual information.¹⁵⁵ Otherwise, the statements would be incomplete and potentially misleading to the jury as to Moussaoui’s culpability.¹⁵⁶ The danger was that the supplements would include inculpatory statements from witnesses the defense had not questioned.¹⁵⁷ To remedy this dilemma, the Fourth Circuit ordered the district court to oversee drafting the submissions, and only Moussaoui could admit them.¹⁵⁸ The Government could not use the witnesses’ statements to advance its own case.¹⁵⁹

III. APPLYING *CRAWFORD*’S COMMANDS TO TERRORISM CASES

Crawford was a “run-of-the-mill assault prosecution,”¹⁶⁰ and one should proceed with caution in extrapolating from a simple criminal case rules of law that may apply to the complexities of a global war on terrorism. Yet, Justice Scalia warned that “replacing categorical constitutional guarantees with open-ended balancing tests . . . and [v]ague standards” in simple cases such as *Crawford* would create grave danger in “politically charged cases . . . where the impartiality of even those at the highest levels of the judiciary might not be so clear.”¹⁶¹

A. *Hamdi*: A Categorical Rule Sacrificed for the “Exigencies of War”

In *Hamdi*, Justice O’Connor’s opinion dimmed the bright-line established in *Crawford*, allowing testimonial hearsay to be admitted

152. *Id.*

153. *Id.* at 480.

154. *Id.* at 481-82.

155. *Id.* at 481. FED. R. EVID. 106 codifies the common law rule of completeness, providing that “[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.”

156. *Id.* at 482.

157. *Id.* at 481-82.

158. *Id.* at 482.

159. *See id.*

160. *Crawford v. Washington*, 124 S. Ct. 1354, 1374 (2004).

161. *Id.* at 1373-74.

without prior cross-examination, at least under analogous facts.¹⁶² The Department of Defense declaration exemplifies the type of ex parte statements Justice Scalia identified as the “principal evil at which the Confrontation Clause was directed.”¹⁶³ Not only was the declarant not present for cross-examination, but even if he had been, he could scarcely attest to the reliability of the statements in his conclusory declaration.¹⁶⁴

In defining a “fair opportunity” to rebut the Government’s charges, Justice O’Connor adopted a balancing test that once again relegated confrontation to a mere “preference”—one option among several for assuring the reliability of hearsay testimony.¹⁶⁵ In fact, allowing the Government to rely on hearsay based on military reports from

162. See *supra* text accompanying notes 121-25. The right to confront witnesses, like the right to counsel, may not technically attach to an unindicted enemy combatant. See *California v. Green*, 399 U.S. 149, 157 (1970) (noting that “it is this literal right to ‘confront’ the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause”). Legal commentators have noted the resulting irony that noncitizen terrorist suspects who are tried in civilian courts may receive greater constitutional protections than citizens who are detained but not criminally charged. *E.g.*, Jesselyn A. Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525, 539-40 (2005). Given the typically clandestine nature of their capture and the indefinite term of their confinement, citizen enemy combatants need the full panoply of due process rights, particularly as the results of that hearing may preclude or postpone further judicial review. *Id.* at 545-53. The Court in *Hamdi* affirmed his right to counsel on remand, as well as his right to factually challenge the Government’s allegations. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660 (2004). The question remains whether allowing the kind of hearsay presented in *Hamdi* to have the presumption in its favor, as the plurality would allow, without confrontation provides the citizen enemy combatant a meaningful opportunity to be heard. See *infra* text accompanying notes 168-72.

163. *Crawford*, 124 S. Ct. at 1363-65. Indeed, Justice Scalia consistently identifies statements the Government obtained in secret and then presented at trial without making the witness available for cross-examination as the archetypal Confrontation Clause violation. *Id.*; see also *Lilly v. Virginia*, 527 U.S. 116, 143 (1999) (Scalia, J. concurring in part and concurring in the judgment).

164. See Brief for Petitioner at *4-7, *Hamdi* (No. 03-6696), 2004 WL 378715. As discussed, the Government’s declarant based his two-page statement on routine records and reports sent in from the field. See *supra* notes 112-13 and accompanying text. Moreover, the military did not even contend that the Special Advisor talked to anyone about the reports. *Hamdi*, 124 S. Ct. at 2637 (plurality opinion).

165. *Hamdi*, 124 S. Ct. at 2649 (plurality opinion). Justice O’Connor explicitly accepted the sufficiency of the Government’s affidavit. *Id.* (plurality opinion). *Hamdi* need only be offered some sort of opportunity to challenge the Government’s allegations, but not necessarily one that would allow him to cross-examine the declarants. *Id.* (plurality opinion) (indicating that a “knowledgeable” affiant may base his declaration on “documentation regarding battlefield detainees already . . . kept in the ordinary course of military affairs”). As the Government’s declaration in *Hamdi* illustrates, such an affiant is unlikely to have first-hand knowledge regarding the veracity of the information. Brief for Petitioner at *4-7, *Hamdi* (No. 03-6696), 2004 WL 378715.

unidentified sources prepared for purposes other than litigation would allow admission of evidence excluded from even the broadest hearsay exceptions.¹⁶⁶ Moreover, Justice O'Connor would place the onus on the accused to negate the impact in court of statements by military officers during war time.¹⁶⁷

Yet it was precisely the drafter's goal in adding the Sixth Amendment to burden the Government by requiring confrontation and cross-examination.¹⁶⁸ Third or fourth hand information obtained piecemeal from unknown witnesses cobbled together into a narrative declaration fails to meet even the looser *Roberts* test.¹⁶⁹ It ignores completely the demands of *Crawford*.¹⁷⁰ The Court granted Hamdi an opportunity to be heard, but he still must challenge statements of witnesses who will never enter the courtroom nor sit across from him in a deposition.¹⁷¹ The "exigencies of war" may call for relaxing hearsay standards, but in *Hamdi*, they were eliminated.¹⁷²

B. Moussaoui Directly Challenges Crawford's Holding

The *Moussaoui* holding presents complex issues involving nearly all of *Crawford*'s unanswered questions.¹⁷³ As a threshold matter, a detainee's statements obtained through interrogation would appear to fit any of the

166. See FED. R. EVID. 805 (allowing hearsay within hearsay if each part of the combined statements conforms with an exception to the hearsay rules). The Government's declaration arguably could fall under the exception for records of regularly conducted activity or public records and reports. *Id.* R. 803(6), (8). However, both rules would disallow the exception if the sources of information or other circumstances indicate lack of trustworthiness. *Id.* The military reports the Government relies upon are characteristics of the traditional "mosaic-like nature of intelligence gathering," in which snippets of information from an array of sources with varying reliability are collected overseas, transmitted to Washington, and then pieced together. *McGehee v. Casey*, 718 F.2d 1137, 1149 (D.C. Cir. 1983) (quoting *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982)). In light of the declarant's description of the source of the information, including an unknown anti-Taliban combatant, the sources of information or other circumstances clearly indicate lack of trustworthiness. See *supra* text accompanying notes 111-14.

167. See *Hamdi*, 124 S. Ct. at 2649 (plurality opinion) (stating that "once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria").

168. See *Berger*, *supra* note 4, at 578-86; see also *supra* text accompanying note 81.

169. See *supra* text accompanying notes 44-62.

170. See *supra* text accompanying notes 76-82.

171. See *Hamdi*, 124 S. Ct. at 2649 (plurality opinion).

172. See *id.* at 2649-50. By finding the Government's declaration satisfied its evidentiary burden, the Court implicitly waives Hamdi's right to confront even the Government's declarant. *Id.* (plurality opinion).

173. See *supra* Part II.B.

three “formulations of testimonial statements” Justice Scalia identified.¹⁷⁴ While usually not given under oath, detainee questioning is “custodial examination” because the detainee is not free to leave, and is held under harsh conditions of confinement.¹⁷⁵ Moreover, inculpatory detainee statements regarding the accused are likely to come from confessional statements.¹⁷⁶

Federal law enforcement involvement in questioning detainees colors the statement as testimonial under even a narrow reading because they are in effect police statements bearing “a striking resemblance” to the ex parte statements the Framers feared.¹⁷⁷ The Court has been particularly wary of custodial confessions, speaking “with one voice in declaring presumptively unreliable accomplices’ confessions that incriminate defendants.”¹⁷⁸

If detainee statements are testimonial, then *Crawford* requires confrontation between the witness and the defendant at some point in the proceedings.¹⁷⁹ The district court’s deposition order would have included such an encounter, at least with Moussaoui’s defense counsel.¹⁸⁰ Yet, one of the primary reasons the Government refused to comply with the district court’s initial order was to prevent direct interaction between

174. See *supra* text accompanying notes 86-88.

175. See, e.g., Don Van Natta Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, at A1 (describing conditions of confinement and interrogation techniques for alleged al-Qaeda detainees); Carol Rosenberg, *We have No Intention of Making it Comfortable*, HERALD.COM, Jan. 10, 2002, <http://www.miami.com/mld/miamiherald/news/world/cuba/2437025.htm?template=contentModules/printstory.jsp> (describing conditions at the detainee facility at Guantanamo Bay Naval Base in Cuba).

176. See, e.g., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 134, at 146. If a detainee is able to provide sufficiently relevant and material information about a terrorist defendant to aid the prosecution, the detainee may very well be implicated at least as a co-conspirator. This is because terrorists operate in semi-autonomous cells. *Id.* at 145, 180, 241-50. Operations are strictly compartmented, and information is shared as needed about other participants, the plan and target for the operation, and the specific dates to attack. *Id.* at 235-36, 244, 249-50. The ability to identify another member of an operational cell may also come from being present at specific meetings or training camps when the accused was there. *Id.* at 234-35, 275-76.

177. See *supra* text accompanying note 88.

178. E.g., *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (noting this presumption against admitting accomplice statements “was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross examination”); see also *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (finding “that accomplices’ confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule . . . [under the Court’s] Confrontation Clause jurisprudence”).

179. See *supra* text accompanying notes 84-98.

180. *United States v. Moussaoui*, No. CRIM. 01-455-A, 2003 WL 21277161, at *3 (E.D. Va. May 15, 2003).

the accused and the detainee.¹⁸¹ The Fourth Circuit agreed with the Government, as its order allowing substitutions indicated.¹⁸²

The circuit court chose to forgo *Crawford* and instead applied a *Roberts*-type test, looking for indicia of reliability as foundational support for admission of substitute testimony.¹⁸³ The court placed confidence in the reliability of the detainees' statements because those questioning them sought information to prevent attacks, not specifically to further prosecution.¹⁸⁴ This confidence may be misplaced because the conditions of confinement may lead a detainee to provide information to please his captors.¹⁸⁵ The Supreme Court itself has registered skepticism regarding such statements, noting that a statement made under duress "may provide no basis for supposing that the declarant is particularly likely to be telling the truth — indeed, the circumstances may even be such that the declarant is particularly unlikely to be telling the truth."¹⁸⁶

IV. RECONCILING *CRAWFORD* AND NATIONAL SECURITY CONCERNS

Crawford established a bright-line test for the admission of hearsay evidence.¹⁸⁷ To be admitted, the statements must be from a witness who

181. See *United States v. Moussaoui*, 382 F.3d 453, 470-71 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (2005).

182. *Id.* See generally Shira A. Scheindlin & Matthew L. Schwartz, *With All Due Deference: Judicial Responsibility in a Time of Crisis*, 32 HOFSTRA L. REV. 1605 (2004), WL 32 HOFLR 1605 (noting that post-September 11 trial courts are more responsive to claims that certain actions of the political branches have endangered fundamental constitutional rights, while appellate courts have been more willing to adopt a deferential attitude).

183. *Moussaoui*, 382 F.3d at 478. The court did acknowledge the *Crawford* holding when it prohibited the Government from offering witnesses' statements in support of its case against Moussaoui. *Id.* at 481. Perhaps the court found *Crawford* inapplicable because the primary focus was on Moussaoui's efforts to obtain exculpatory information available to the prosecution, or because of the national security concerns implicated in the defendant's efforts to gain access to the detainee witnesses.

184. *Id.* at 478.

185. See, e.g., Michael Isikoff, *Iraq and Al Qaeda: Forget the 'Poisons and Deadly Gases'*, NEWSWEEK, July 5, 2004, at 6, 6. Isikoff reported that a captured al-Qaeda commander, the principal source for allegations that Usama Bin Laden collaborated with Saddam Hussein, recanted his story. *Id.* The article cites U.S. officials who said they suspect that the commander told his interrogators what they wanted to hear in the face of aggressive interrogation techniques. *Id.*

186. Chase, *supra* note 27, 1049-50 (quoting *Idaho v. Wright*, 497 U.S. 805, 822-23 (1990)). An additional concern is that a detainee may provide exculpatory information regarding the accused, but it will not be reported because the information does not provide intelligence to prevent further attacks. *Moussaoui*, 382 F.3d at 462 n.14. Yet as government agents, interrogators are considered part of the prosecutorial team; the defendant, therefore, is entitled to the information. The Fourth Circuit dismissed this possibility as "unlikely" without further explanation. *Id.*

187. See *supra* text accompanying notes 83-92.

is unavailable at trial, and the accused must be afforded a prior opportunity for cross-examination.¹⁸⁸ By limiting judicial discretion, the Court provided a coherent and intelligible rule that lower courts can consistently apply.¹⁸⁹ Yet *Crawford* appears to provide no avenue to protect legitimate national security concerns when the Government seeks to use out-of-court statements to detain an American citizen as an “enemy combatant” or try a suspected terrorist in a civilian court.¹⁹⁰

The *Federal Rules of Criminal Procedure* provide the means to preserve the constitutional right to confrontation, while adjusting on a case-by-case basis to the exigencies of an unprecedented war on terrorism.¹⁹¹ This Part will explore avenues for doing so, focusing first on the use of the type of hearsay testimony relied on in *Hamdi*. Then, the more thorny issues implicated in *Moussaoui* will be addressed.

A. *The Use of Hearsay Against U.S. Citizens Must Follow the Crawford Bright-Line Test*

Few dispute the authority of the military to detain a suspected enemy on the battlefield, regardless of his or her citizenship.¹⁹² When the imminent threat has abated and the prisoner is securely incarcerated, however, constitutional guarantees take primacy.¹⁹³

The Court should reconcile the apparent conflict between the standards for the admission of hearsay evidence articulated in *Crawford* and those adopted in *Hamdi*.¹⁹⁴ At a minimum, the Government’s case should not rest on third or fourth hand hearsay, whose reliability is impossible to gauge.¹⁹⁵ To allow a government official, without first hand knowledge, to attest to unspecified allegations leads to the kind of inconsistency illustrated in *Crawford* itself.¹⁹⁶ Worse, it invites abuses in

188. See *supra* text accompanying notes 89-91.

189. See *supra* text accompanying notes 83-97.

190. See *supra* text accompanying notes 83-97.

191. See *infra* text accompanying note 223.

192. See Brief for Petitioner at *10, *Hamdi v. Rumsfeld*, 123 S. Ct. 2633 (2004) (No. 03-6696), 2004 WL 378715 (noting that *Hamdi* does not challenge his initial seizure or transfer to U.S. custody).

193. *Hamdi*, 124 S. Ct. at 2648 (plurality opinion) (noting that it is during times of crisis that the Nation “must preserve our commitment at home to the principles for which we fight abroad”).

194. See *Crawford v. Washington*, 124 S. Ct. 1354, 1370 (2004) (noting that it runs counter to the history of the Confrontation Clause to adopt the position that “the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability’”).

195. See *supra* text accompanying notes 86-88. The Government’s deposition in *Hamdi* and witness statements taken in secrecy typify the egregious abuses the Confrontation Clause was designed to cure.

196. See *supra* text accompanying notes 81-84.

the name of national security, such as those that have occurred at other times when our national security appeared threatened.¹⁹⁷ Once the Government designates a prisoner an “enemy combatant,” detention may last until the end of hostilities.¹⁹⁸ Given the prognosis for the threat of anti-American terrorism, this may be indefinitely.¹⁹⁹

B. Preserving Confrontation Through Compromise

More complicated cases, such as *Moussaoui*, involve statements from witnesses whom the Government has made unavailable, citing national security concerns.²⁰⁰ In *Moussaoui*, the prosecution voluntarily chose to forgo using detainee statements.²⁰¹ The defendant’s exercise of his compulsory process right to subpoena witnesses who made exculpatory statements implicated Confrontation Clause issues because, inter alia, prosecutors wanted to supplement any statements *Moussaoui* chose to use.²⁰² It is foreseeable that a future case may implicate out-of-court detainee statements as part of a critical chain in the prosecution’s case-in-chief.²⁰³ The question then becomes whether Justice Scalia’s clear

197. See *infra* text accompanying notes 232-37; see also *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (approving measures during World War II directed at persons of Japanese ancestry). While *Korematsu* often is cited for this proposition, it is particularly fitting given the widely drawn analogy between the attack on Pearl Harbor and those on September 11, 2001 in New York and Washington, D.C. E.g., James J. Wirtz, *Déjà Vu? Comparing Pearl Harbor and September 11*, 24 HARV. INT’L REV. 73 (2002); Toni Stroud, *Silence Speaks at Pearl: 60 Years Later, USS Arizona Grave Still Haunts Visitors*, CHI. TRIB., Nov. 25, 2001, at C8, LEXIS, News Library, Chtrib File.

198. Jaykant M. Patidar, Note, *Citizenship and the Treatment of American Citizen Terrorists in the United States*, 42 BRANDEIS L.J. 805, 817 (2004), WL 42BRNDLJ 805 (explaining that enemy combatants “are denied their constitutional protections, which include the basic right of talking to an attorney or being tried, until the end of hostilities”).

199. *Id.*

200. *United States v. Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004), *cert. denied*, 73 U.S.L.W. 3556 (2005).

201. Brief for the United States at 70 n.24, *Moussaoui* (No. 03-4792) (stating that the prosecution does not seek to offer detainee witness statements—or summaries thereof—in its case-in-chief).

202. *Moussaoui*, 382 F.3d at 482.

203. Brief for the United States at 2-3, *Moussaoui* (No. 03-4792). In its brief, the Government argued:

Beyond any effect on this case, the district court’s analysis threatens the Government’s ability to prosecute any terrorists for the crimes of September 11 or other terrorists for any future attacks. . . . In subsequent cases, where defendants do not voluntarily incriminate themselves, the logic of the district court’s opinion [requiring production of the detainees for video depositions] would foreclose prosecution entirely. The Government’s successes in the war on terrorism have given it access for intelligence gathering purposes to enemy combatants with substantial knowledge of al Qaeda’s operations. Under the district court’s decision, any defendant charged with criminal responsibility for

position that the Constitution demands confrontation still holds sway over Justice O'Connor's balancing approach—the *Roberts* test for indicia of reliability.

When the Government seeks to use out-of-court statements to convict a terrorist suspect, the demands of the Confrontation Clause require more than unchallenged assertions by a detainee who has not faced adversarial questioning.²⁰⁴ This would be consistent with the rationale in *Crawford*.²⁰⁵ Conversely, the weaknesses of *Roberts* are no clearer than in terrorism cases involving detainee testimony taken in secret.²⁰⁶ The other factors of reliability noted in *Roberts*—oath, adversarial testing, and the demeanor of the witness—are absent.²⁰⁷

The Confrontation Clause needs to be read within the context of other procedural protections in the Bill of Rights.²⁰⁸ Taken together, they substantiate the Framers' focus on protecting the accused's rights against the overwhelming power of the state.²⁰⁹ History and experience taught the Framers that the state may rely on criminal prosecution to eliminate

terrorist operations related to al Qaeda will be able to make a plausible claim to have access to these combatants. The district court's analysis puts the Government to the choice of either gathering intelligence to maximize the prospects for avoiding future terrorist attacks or prosecuting terrorists. However, nothing in the Constitution puts the Government on the horns of this dilemma.

Id.

204. *Moussaoui*, 382 F.3d at 481-82. In deference to Moussaoui's Confrontation Clause rights, the circuit court made clear that the "rule of completeness is not to be used by the Government as a means of seeking the admission of inculpatory statements that neither explain nor clarify the statements designated by Moussaoui." *Id.* at 482. To ensure Moussaoui's constitutional rights were protected, the court further ruled that only the defendant could introduce detainee statements to comport with his compulsory process rights. *Id.*

205. *Crawford v. Washington*, 124 S. Ct. 1354, 1369 (2004) (finding that the case law has "remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine").

206. *Id.* (noting that the *Roberts* test "fails to protect against paradigmatic confrontation violations" by applying the same analysis "whether or not the hearsay consists of ex parte testimony . . . [and by] admit[ing] statements that *do* consist of ex parte testimony upon a mere finding of reliability").

207. *See Moussaoui*, 382 F.3d at 481 n.38 (noting the absence of demeanor evidence for the jury to weigh when considering the truthfulness of the detainees' statements). The Government's desire to prevent the detainee from knowing he is providing evidence for trial precludes requiring the detainee to take an oath, while the point of the substitutions is, *inter alia*, to prevent detainee contact with the defendant. *Id.* at 470-71, 482.

208. *See Friedman, supra* note 8, at 468 (noting the consistency with which the confrontation right was tied to other criminal procedure protections in even early drafts of the Sixth Amendment).

209. *See supra* text accompanying note 81.

political enemies.²¹⁰ The Fifth Amendment's Self-Incrimination Clause, the Seventh Amendment right to counsel at critical stages of the prosecution, public trials, and right to a jury evolved from this tradition.²¹¹ These protections interfere with the truth-seeking function.²¹² Nonetheless, the *Crawford* Court singled out custodial confessions and other evidence the Government produced in secret as particularly dangerous tools in the state's arsenal.²¹³

Ex parte detainee statements lack even the *Roberts* indices of reliability because there is no cross-examination, no demeanor evidence for the jury to weigh, and no oath.²¹⁴ The setting is undoubtedly adversarial, but it is not so for the purposes of advocating the defendant's case.²¹⁵ Even if the defendant is allowed to pose questions to the detainees, the questions are presented out of context and unstructured to avoid letting the detainee know the purpose of the questions.²¹⁶ This simply cannot be called "cross-examination" in any true sense of the term.²¹⁷

210. See Berger, *supra* note 4, at 568-71 (tracing the English Crown's use of ex parte statements against political opponents); *id.* at 580-86 (explaining the Framers' experience with similar practices in the American Colonies).

211. *Id.* at 562-63, 588.

212. *E.g., id.* at 586 (noting that in *Massiah v. United States*, 377 U.S. 201, 206-07 (1964), the Supreme Court held that the right to counsel was implicated when government agents interrogated an indicted defendant despite potential interference with truth-seeking); see also *id.* at 208 (White, J., dissenting).

213. *Crawford v. Washington*, 124 S. Ct. 1354, 1367 & n.7 (2004) (noting that the Government's involvement in producing testimony with potential prosecution in mind "presents unique potential for prosecutorial abuse—a fact borne out time and again throughout a history with which the Framers were keenly familiar").

214. See *supra* text accompanying notes 111-13, 146-49; see also *United States v. Moussaoui*, 382 F.3d 453, 481 n.38 (4th Cir. 2004) (acknowledging but excusing the absence of demeanor evidence when substitute statements are allowed in lieu of direct testimony), *cert. denied*, 73 U.S.L.W. 3556 (2005).

215. See *Moussaoui*, 382 F.3d at 470 (noting that the Government sought to maintain ongoing questioning of the detainees to prevent future attacks); see also Brief for the United States at 41-43, *Moussaoui* (no. 03-4792).

216. See *Moussaoui*, 382 F.3d at 460 (indicating that questions submitted for use with detainees are treated as discretionary); see also *id.* at 478 (noting that the substitutions are drawn from "summaries of statements made over the course of several months"). During litigation of *Moussaoui*'s compulsory process rights, members of the National Commission on Terrorist Attacks upon the United States were allowed to submit questions for use in interrogations. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 134, at 146. They, too, had no control over the manner in which the questions were asked. *Id.* They were told that questioning the detainees on their behalf "might disrupt the sensitive interrogation process." *Id.*

217. BLACK'S LAW DICTIONARY 405 (8th ed. 2004) (defining "cross-examination" as "[t]he questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify"); see Berger, *supra* note 4, at 566-67 (describing analogous deficiencies in meeting the confrontation requirements). As Professor Berger suggests, in

The Fourth Circuit's reliance on CIPA to authorize substitutions places a gloss of congressional authorization on its ruling.²¹⁸ CIPA requires courts to balance national security concerns against the defendant's Sixth Amendment rights.²¹⁹ The balancing is weighted toward the defendant, requiring that the defendant be left with "substantially the same ability to make his defense as would disclosure of the specific classified information."²²⁰ Nonetheless, the procedures protect classified intelligence through substitutions.²²¹ In this sense, CIPA does provide guidance for cases such as Moussaoui's by allowing means other than public disclosure for the defendant to use classified information.²²²

If the Government chooses to prosecute, Rule 15 provides an avenue for respecting a defendant's confrontation rights while accommodating security concerns.²²³ This was the district court's initial response to

those contexts, the jury "need[s] to know about the government's role in creating this evidence" to weigh the evidence properly and be informed about the bias inherent in the interrogation process, including the possible use of physical and psychological pressure and implied or explicit threats. *Id.* at 566.

218. *Moussaoui*, 382 F.3d at 476 (referencing Congress's intent in enacting CIPA to ensure that the executive branch's efforts to protect classified information did not overcome an accused's right to a fair trial).

219. See Saul M. Pilchen & Benjamin B. Klubes, *Using the Classified Information Procedures Act in Criminal Cases: A Primer for Defense Counsel*, 31 AM. CRIM. L. REV. 191, 211 (1994). Litigation over disputes rising under CIPA enforcement is common, lengthy, and tedious. See *id.* at 211-14. Proceedings and submissions under both sections are held in camera, and defense counsel frequently is required to have a security clearance to review classified material that cannot be completely wiped clean of sensitive information without altering its relevancy or exculpatory value. *Id.* at 193, 197 n.21.

220. 18 U.S.C. app. 3 § 6(c)(1) (2000).

221. *Moussaoui*, 382 F.3d at 477.

222. *Id.* at 476-78.

223. See Nancy Gertner, *Video Conferencing: Learning Through Screens*, 12 WM. & MARY BILL RTS. J. 769, 774 (2004) (explaining that Rule 15 depositions meet Confrontation Clause requirements under "exceptional circumstances"). In order to use videotaped depositions, admission of former testimony and governing unavailability of the witness also must be met. FED. R. EVID. 804(a), (b)(1). Arguably, application of *Crawford* in these circumstances enhances the appeal of military tribunals, particularly in the aftermath of another attack in the United States. See *The Moussaoui Experiment*, WASH. POST, Jan. 27, 2003, at A18 (advocating transferring Moussaoui's case to a military commission because it may create "bad law" given the pressure on prosecutors to cut doctrinal corners and the heinous nature of the crimes alleged). While military tribunals do not enforce the Sixth Amendment safeguards in the same manner as in civilian courts, the Confrontation Clause's antecedents in both English and American common law, as well as the values of fundamental fairness that led to its adoption, compel its adoption regardless of the tribunal. See Dratel, *supra* note 17, at 20-21. More importantly, no prosecution, regardless of the forum, can rely on the testimony of a witness held in secret and questioned under unknown circumstances without trampling on the core values the Framers preserved. See *Crawford v. Washington*, 124 S. Ct. 1354, 1364-65 (2004).

Moussaoui's request for access to the detainees,²²⁴ but the Government cited serious and specific justification for refusing to comply.²²⁵ The Government's concerns should be respected because they go to the heart of the President's ability to wage an effective, long-term war against terrorism.²²⁶

Defense counsel also must be allowed to obtain specific answers to questions posed.²²⁷ If direct examination would disrupt critical questioning of the detainee, the Government must instead submit defense questions as written and provide unaltered transcripts of the witness's responses.²²⁸ If the prosecution objects to specific questions for articulated cause, they and defense counsel should craft alternative language.²²⁹ Follow up questions also should be allowed, particularly when multiple groups already are submitting questions that are likely to

224. *Moussaoui*, 382 F.3d at 456; see also *supra* text accompanying notes 144-46.

225. See *supra* text accompanying note 136.

226. See Brief for the United States at 41-42, *Moussaoui*, (No. 03-4792). During litigation the parties did not dispute the Government's assertion that

[t]he Nation is currently engaged in an armed conflict with an enemy force that has already killed more than 3,000 individuals in attacks carried out within the continental United States and hundreds more in attacks on U.S. embassies, warships, and other interests abroad. The interest at stake in this case involves paramount concerns of protecting national security by preserving the Government's ability to gather intelligence vital to saving American lives and winning this ongoing war.

Id. Moreover, foreign leaders often risk domestic instability by publicly supporting U.S. counterterrorist policies. See, e.g., *Terrorism, Al Qaeda, and the Muslim World: Hearing Before the Nat'l Comm'n on Terrorist Attacks upon the U.S.* (2003) (statement of Steven Emerson, Executive Director, Investigative Project, Author, *American Jihad: The Terrorists Living Among Us*), http://www.9-11commission.gov/hearings/hearing3/witness_emerson.htm (July 9, 2003). Emerson cited a 2002 survey by the Pew Research Center for the People and the Press concerning global attitudes. The survey asked respondents in a number of countries whether they favored or opposed the U.S.-led efforts to fight terrorism. *Id.* Emerson provided the following survey results: "[M]ore than 50% of those in Indonesia, Turkey (99.8% Muslim), and Senegal (94% Muslim) 'oppose the US-led efforts to fight terrorism' [; and] 79% of those in Egypt (94% Muslim) and 85% of those in Jordan 'oppose the US-led efforts to fight terrorism.'" *Id.* (citation omitted). The number of those opposed to U.S. counterterrorist policies is likely to have increased further following the invasion of Iraq in 2003.

227. Sam A. Schmidt & Joshua L. Dratel, *Turning the Tables: Using the Government's Secrecy and Security Arsenal for the Benefit of the Client in Terrorism Prosecutions*, 48 N.Y.L. SCH. L. REV. 69, 69 (2004). Defense counsel in most national security cases have limited clearances that allow them to review a sizeable amount of classified information. *Id.* at 70.

228. *Id.* at 69-70.

229. See, e.g., *Moussaoui*, 382 F.3d at 480 (ordering an "interactive" process involving the defense, prosecution, and the court in drafting substitutions to be used in lieu of testimony).

expand on previous answers.²³⁰ The Government should be granted some flexibility in deciding when to ask the questions, within a set time frame.²³¹

Cases such as *Moussaoui*, where detainee statements may be both inculpatory and exculpatory, are more complex.²³² The Fourth Circuit struck an appropriate balance in finding that the prosecution may seek inclusion of information that will make the witnesses' statements complete, without allowing the Government to use the detainees' statements to further its case.²³³

The Constitution is neither a "suicide pact"²³⁴ nor is it dispensable, even in times of crisis.²³⁵ Accommodations to competing demands have been struck since the beginning of the Republic, so long as the ultimate purpose of safeguarding individual liberty was preserved.²³⁶ The Sixth Amendment is not immune to this process, and the fair trial rights it guarantees are not absolute.²³⁷ They have been abridged before in the interest of the administration of justice.²³⁸ The Confrontation Clause also

230. See *supra* notes 146, 216 (noting that the prosecution team and the National Commission on the Terrorist Attacks Upon the United States had submitted questions or suggested lines of inquiry).

231. See *Moussaoui*, 382 F.3d at 479 (indicating that the process by which members of the prosecution team contributed to detainee questioning had worked no unfairness on *Moussaoui*).

232. See *supra* notes 154-59 and accompanying text.

233. *Moussaoui*, 382 F.3d at 480-82. The circuit court gave the prosecution a strict admonition against attempting to include inculpatory information under the guise of completeness. *Id.* at 481-82. The trial judge will have final say over the wording of the substitutions, and the prosecution will not be allowed to raise further objections in a CIPA-like setting. *Id.* at 482.

234. *Haig v. Agee*, 453 U.S. 280, 309-10 (1981) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963)).

235. *United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.").

236. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (plurality opinion). According to the Court:

"The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action."

Id. (citing and quoting *Kennedy*, 372 U.S. at 164-65).

237. See *supra* text accompanying notes 30-38.

238. E.g., *Illinois v. Allen*, 397 U.S. 337, 346-47 (1970) (approving the removal of a disruptive defendant from the courtroom); *United States v. Kneeland*, 148 F.3d 6, 12 (1st Cir. 1998) (finding an implicit waiver of counsel where the defendant repeatedly refuses to work with court appointed attorneys). In these circumstances, the defendant's own actions have led to an implicit waiver of constitutional protections. The overriding

can accommodate important national security concerns, but the accused's right to confront those who levy charges against him must be upheld. *Crawford* is a clear and timely affirmation of Chief Justice Marshall's call to be watchful against inroads on these principles.

V. CONCLUSION

The Supreme Court's Confrontation Clause rulings have swung during the last fifty years between two conflicting interpretations. The dominant reading admitted hearsay from unavailable witnesses as long as other indices of reliability were present. *Crawford* represents the ascendancy of an originalist interpretation that would allow such statements only if the witness was both unavailable and the accused had a prior opportunity for confrontation. Yet *Crawford* left significant questions unanswered: standards for defining testimonial statements, sufficient opportunity for cross-examination, and the scope of the unavailability requirement. These issues are particularly troubling in terrorism cases, where the Government frequently must rely on hearsay to make its case. Read within the Court's handling of other Sixth Amendment cases, *Crawford* does not permit the type of crime charged to permit abridging Sixth Amendment protections. The Court, however, has left open alternative methods to reconcile the defendant's interests with national security concerns. Striking this balance is the most valuable contribution the judiciary makes to protecting what terrorists threaten most.

consideration, however, was providing the defendant a fair trial under challenging circumstances. See David S. Kaplan & Lisa Dixon, *Coerced Waiver and Coerced Consent*, 74 DENV. U. L. REV. 941, 953 (1997).

